No. 88-963

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In the Supreme Court of the United States

OCTOBER TERM, 1988

EVA J. CULBERSON, PETITIONER

v.

VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE VETERANS ADMINISTRATION IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence supported the district court's finding that the Veterans Administration did not discriminate against petitioner on the basis of race or sex.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported. The opinion of the district court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1988. A petition for rehearing was denied on August 15, 1988. The petition for a writ of certiorari was filed on November 14, 1988 (a Monday). The jurisdiction of this Court in invoked under 28 U.S.C. 1254.

STATEMENT

1. Petitioner is a black woman who graduated from law school in May of 1979. While waiting for the results of the bar examination, she applied for a job as an attorney with the Detroit District Counsel's Office of the Veterans Administration. She stated on her application that she would accept a salary of $16,000. Pet. App. 2a.

The Assistant District Counsel in Detroit interviewed petitioner. The Detroit office then recommended to the General Counsel's Office in Washington, D.C. that she be hired. The General Counsel's Office makes all decisions regarding the hiring of VA attorneys. In the past, the Detroit office had hired only attorneys who had passed the bar (Pet. App. 2a). The Detroit office, however, wanted to hire petitioner as a law clerk at General Schedule (GS) level 9; they planned to convert her job status to an attorney position once she passed the bar. In 1979, when petitioner was hired, VA District Counsel offices were restricted to hiring entry level attorneys at the GS-9 level (*id.* at 2a-5a).

The VA hired petitioner at the GS-9 level, which paid more than $17,000. Two weeks later, petitioner learned that she had passed the bar examination. The VA converted her job position from "law clerk" to "attorney", but it declined petitioner's request for a grade increase to the GS-11 level (Pet. App. 6a). According to standard VA policy, an employee hired at the GS-9 level must wait at least one year before becoming eligible for promotion to GS-11 (*ibid.*). After petitioner filed a charge of discrimination, the Detroit District Counsel requested an exception to that rule to allow petitioner to be promoted immediately to the GS-11 grade level. (*id.* at 6a-7a). The General Counsel's Office denied that request. Accordingly, petitioner worked one year at grade GS-9 before she was promoted to GS-11. She is now employed by the Detroit office at the GS-13 level (*ibid.*).

2. Petitioner filed this suit claiming race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. 206. After a two-day trial, the district court found in favor of the VA. The district court ruled that petitioner had failed to prove her claims of discrimination (Pet. App. 16a-31a). The court found that the VA had legitimate reasons for hiring petitioner at the GS-9 level (*id.* at 17a-21a).

The court of appeals affirmed on the basis of the findings and conclusions of the district court. Pet. App. 10a.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decisions of any other court of appeals. Indeed, petitioner argues only that the court of appeals erred in holding that the district court's findings were supported by the evidence. This Court's review of that fact-specific claim is not warranted.

1. Petitioner attempted to prove her claim of discrimination by comparing herself to two other VA attorneys—Maureen Faes and Richard Cunningham. The Detroit office employed Faes and Cunningham at a higher grade than petitioner (Pet. App. 7a-8a). The district court found that Ms. Faes was hired in 1977 at the GS-11 level. At that time, she had been a member of the bar for two years. She also had previous experience as a teacher, which the VA considered to be useful for instructing other personnel at the Detroit office (*id.* at 22a-23a). In 1977, moreover, the VA hired new attorneys at the GS-11 level. When petitioner was hired in 1979, by contrast, the standard entry level was GS-9 (*id.* at 23a). Thus, the district court had substantial evidence to support its finding that the VA legitimately treated petitioner and Ms. Faes differently.

Mr. Cunningham was transferred to the Detroit District Counsel's Office at the same time that petitioner was hired. Unlike petitioner, however, he was a licensed attorney when he transferred. He also had worked for the VA for ten years and had been Chief of Field Services in another office. Cunningham was a GS-12 in his prior position and the VA allowed him to continue at that grade as an attorney (Pet. App. 24a).* Accordingly, as the district found, the VA treated Cunningham differently from petitioner because of his prior government experience (*ibid.*).

There is other evidence to support the district court's findings. In January and March of 1980, shortly after petitioner began working, the Detroit office hired two white men as attorneys. As was the case with petitioner, they were hired at the GS-9 level and promoted to the GS-11 level after one year (Pet. App. 8a). In sum, the district court had a solid basis for finding that petitioner "failed to present any evidence that she was treated differently because she is black in either terms of hiring or promotion" (*id.* at 25a).

2. The district court also was justified in rejecting petitioner's claim under the Equal Pay Act—*i.e.*, that she "was paid less than white male GS-13 attorneys for performing the same work at that level" (Pet. 4). The Equal Pay Act prohibits an employer from paying wages to employees of one sex at a rate less than the rate being paid to employees of the opposite sex for equal work. See 29 U.S.C.

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* In determining the rate of pay of individuals under the GS system, a distinction is made between new appointments, such as petitioner, and reassignments, such as Mr. Cunningham. 5 C.F.R. 531.203, 531.202(j). Because Mr. Cunningham was being reassigned within the agency, he was eligible to be paid at his highest previous rate, which was GS-12. 5 C.F.R. 531.203(c).

206(d)(1); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Different wages may be paid if such difference is due to seniority or to any factor other than sex. 29 U.S.C. 206(d)(1).

Here, the four men at the GS-11 level with whom petitioner compared herself had been with the VA for several years at the time petitioner was hired (Tr. 23). Mr. Cunningham, who was a GS-12, had also been with the VA for many years. Petitioner was treated exactly the same as two inexperienced men who were hired soon after she began working. Those attorneys were hired at the GS-9 level and were required to remain in that grade for one year (Pet. App. 21a-22a, 25a). Thus, the district court correctly found that petitioner failed to prove a violation of the Equal Pay Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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